Supreme Court, U.S.
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85-1427

No.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JOHN R. PEEPLES, JR.,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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Appendix - A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-1424

John R. Peeples, Jr., Appellant, versus United States of America, Appellee. Appeal form the United States District Court for the District of South Carolina,at Columbia. Matthew J. Perry, District Judge. (C/A No. 82-116)

Submitted: September 10, 1985

Decided: October 24, 1985 Before RUSSELL, WILKINSON and SNEEDEN , Circuit Judges.

(John Randolph Peeples, Jr., Appellant Pro Se. Glen E. Craig, Assistant United States Attorney, for Appellee.)

PER CURIAM:

On the second day of a two day open house sponsored by the United States Air Force at Shaw Air Force Base (AFB), John R. Peeples, Jr. staged a one-man demonstration against the sponsor of one of the exhibits. Peeples stood on the ramp area near the grandstands where he distributed leaflets and displayed a t-shirt-sized placard hung around his neck which read:

Civil Air Patrol Auxiliary of the United States Air Force Liars? Murders? Thieves? Thugs? Slime? Scum? Congress Should Investigate!

Apparently Peeples, a former member of the Civil Air Patrol, had been expelled from the organization and still maintained grievances against it which he wished to communicate to people at the open house. The demonstration did not go unnoticed. Shaw AFB security personnel approached Peeples

and requested that he put away his sign. He refused, created a disturbance, and was escorted in handcuffs to the base security office. At the office the base commander told him he could remain on the base if he did not continue his previous activity. He objected and the base commander issued him a disbarment letter. Thereafter, the security personnel removed him from the base and returned all his personal property.

Peeples instituted this action pursuant to 42 U.S.C. Sec. 1983 and 28 U.S.C. Sec. 2680(h) of the Federal Tort Claims Act alleging that by detaining him and taking his placard the United States government denied him his constitutional right to protest against the Civil Air Patrol at the Shaw AFB open house and that he was assaulted, battered, falsely arrested and falsely imprisioned by agents of

the government. He seeks damages and injunctive relief. The United States is the only named defendant. The district court concluded that there was no question of material fact concerning Peeples' alleged injuries. The court also decided that since Air Force security personnel were immune from damages the United States was also not liable for damages, and that, in any event, Peeples' constitutional rights were not violated. On the basis of its findings, the court granted summary judgment for the government.1

In deciding whether the district court properly granted summary judgment this Court must determine whether the moving party affirmatively demonstrated that there was "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). We must view the record in the light most favorable to the party opposing the motion and

"indulge all inferences favorable" to that party. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962). The Supreme Court, however, in an effort to reduce the burden of litigation on society and its officials, stated, "insubstantial claims should not proceed to trial." Harlow v. Fitzgerald, 457 U.S. 800, 816 (1962). We conclude that Peeples' claim was correctly decided on summary judgment in favor of the government.

Initially, we noted that Peeples cannot maintain this action against the government under 42 U.S.C. Sec. 1983. District of Columbia v. Carter, 409 U.S. 418, 424-25 (1973). He must rest his claim for damages solely on a theory of government liability under the Federal Tort Claims Act's provision in 28 U.S.C. Sec. 2680(h). Under Sec. 2680(h) the government's liability is coterminous with the

liability of its agents under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971); Norton v. United States, 581 F.2d 390 (4th Cir. 1978). Additionally, the government may assert all the defenses which the individual agents could assert. Norton, supra.

We agree with the district court that Peeples was unable to raise a factual issue concerning the force used to apprehend him and any injury he may have incurred. None of the detaining officials noted any injuries on Peeples; and the only doctor Peeples retained to examine him, a week after the incident, also failed to observe any significant injury. The record indicates that the security personnel followed standard procedure when detaining Peeples, including a pat down search and the use of handcuffs when he resisted. No unnecessary force was used. Peeples makes only the vaguest

allegations to the contrary which cannot withstand the officials' and his own doctor's testimony. Thus summary judgment for the government was proper on the assault and battery issues.

We also agree with the district court that the United States Air Force security personnel were entitled to qualified immunity for their actions. In Harlow, supra, the Supreme Court discussed the immunity to be given public officials. The Air Force personnel are entitled to immunity under Harlow if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, supra, at 818. On summary Judgment motion this is solely an objective inquiry. McElveen v. County of Prince William, 725 F.2d 954 (4th Cir. 1984). The key question in this case is whether a reasonable person would

have known that Peeples had a clearly established right to display the sign in issue during the open house. If such a right clearly existed then the detention of Peeples and the taking of his placard could subject the government to liability under 2680(h).

When the events in issue occurred, two circuit court of appeals had addressed the issue of the scope of First Amendment rights at an open house on a military base. The two courts disagreed over whether an open house on a military base created a temporary public forum. Compare Persons For Free Speech at SAC v. United States Air Force, 675 F.2d 1010 (8th Cir.), cert. denied 459 U.S. 1092 (1982) (found no temporary forum created), with United States v. Albertini, 710 F.2d 1410 (9th Cir. 1983) (found a temporary public forum created). Recently, however, the Supreme

Court reversed the Albertini decision and, although it did not decide the issue, the Court noted in dicta that "the conclusion that [the military base in issue] was ever a public forum is dubious." United States v. Albertini, U.S. , 53 U.S.L.W. 4844, 4847 (June 24, 1985). Under these circumstances, Peeples' conduct was not clearly protected by the First Amendment so as to make it a clearly established constitutional right. Thus, the United States government personnel are immune from damages for their actions in detaining Peeples and, by extension, the government is also immune. Norton, supra.

Peeples also requests injunctive relief to enjoin the United States government "from causing or allowing to be caused such unlawful activities as alleged herein." Under the standard set forth in Los Angles v. Lyons, 461 U.S. 95 (1983), Peeples

has failed to demonstrate a case or controversy that would justify granting equitable relief. He has not established a "real or immediate threat" that he would again protest and again be prevented from displaying his placard at a subsequent Shaw Air Force Base open house. Therefore, injunctive relief is inappropriate.2

Accordingly, we affirm the district court's grant of summary judgment. Because it would not significantly aid the decisional process, we dispense with oral argument.

AFFIRMED.

1The district court adopted a magistrate's report and recommendation.

2We note the Supreme Court's dicta in Albertini that whether a military base can ever be a temporary public forum is dubious.

United States v. Albertini, supra, at 4847. Justice O'Connor, writing for the majority, wrote that military bases are generally not public fora, and that a base does not become a public forum merely because it is used to communicate ideas or information during an open house. Id. Moreover, there is nothing in the record to suggest that the Commander of Shaw Air Force Base so completely abandoned control over the base that it became indistinguishable from a public street as was the case in Flower v. United States, 407 U.S. 197 (1972) (per curiam). Thus, even if injunctive relief was an appropriate remedy, it is unlikely Peeples would be entitled to an injunction.

Appendix - B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION JOHN R. PEEPLES, JR., Plaintiff, vs. UNITED STATES OF AMERICA, Defendant. CIVIL ACTION NO. 82-116-0 AFFIDAVIT OPPOSING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

John Randolph Peeples, Jr., being duly sworn, deposes and says of his own personal knowledge:

a. He is the plaintiff in the above-entitled action and he makes this affidavit in opposition to the motion for summary judgment of defendant.

b. The facts with respect to the transaction that is the basis of this action are set out in the request for admission of facts and genuineness of documents attached hereto and affiant is competent to

testify thereto.

c. There is a genuine issue between the parties as to the following facts material to this action:

1. Defendant has been allowed ten days in which to answer the request for admissions and all facts for which a denial or for which a statement is made setting forth why he cannot truthfully admit or deny the request will be a genuine issue.

REQUEST FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS.

TO: HENRY DARGAN McMASTERS, United States Attorney, and Glen E. Craig, Assistant United States Attorney, Attorneys for the Government.

NOW COMES THE PLAINTIFF who hereby requests that the defendants, in ten (10) days

after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to the admissibility which may be interposed at the trial:

I. That each of the following statements is true:

1. That the plaintiff, John R. Peeples, Jr., is a citizen of the United States of America and of the State of South Carolina, County of Sumter and is domiciled and resides in the State and District of South Carolina, within this judicial division.

2. That an altercation occurred between the plaintiff, Peeples, and Col. Church Watkins, Jr., Base Commander, Col. Shaff, Deputy Base Commander, Maj. Mayer, Chief Security Police, Lt. Eduardo J. Serer, MSgt. Botchie, MSgt Brown, TSgt. Lackey,

on November 2, 1980, at Shaw Air Force Base, South Carolina, and, these members of the armed forces were acting as law enforcement officers within the scope of employment of the United States Government, about 1:30 P.M.

3. That approximately 1:00 P.M. on November 2, 1980 a portion of Shaw Air Force Base was open to thousands of members of the general public who were invited unconditionally through local newspaper adds to view exhibits and public military demonstrations.

4. That this was two days before the general election that year and many of the visitors wore campaign buttons, had inscriptions on their sweat shirts, etc. and a variety of insignias on their hats, and displayed bumper stickers on their vehicles.

5. That the plaintiff, Peeples, moved with

the crowd and wore a placard about the size of a tee-shirt around his neck which read, "Civil Air Patrol - Auxiliary of the United States Air Force - Liars? - Murders? - Thieves? - Thugs? - Slime? - and - Scum? - Congress Should Investigate!". Peeples talked with other visitors who were interested in his experiences with the Civil Air Patrol.

a. That he had joined the organization to foster the objectives and purposes of the corporation and had loaned $600.00 that was used for part of the down payment on an aircraft that was to be available to members for training and search and rescue. That this money was to be paid back in flight time and funds as available. No interest was charged.

b. That a corporate officer, Col. John A. Taylor, S.C. Wing Commander, and, CAP member Edward D. Lofton, Commander of the

Sumter Squadron, attempted to defraud Peeples of his loan and accomplish other political aims by having Lofton sign a malicious grand larceny warrant against Peeples while he was riding in the aircraft that he had helped purchase, as an official FAA certified flight instructor, with a CAP member student pilot. No charges were brought against the student CAP member.

c. That to further coerce and intimidate Peeples, Taylor and Lofton waved Christian cross at him at a S.C. Wing CAP meeting in the Bell telephone building in Columbia, S.C. and screamed that they loved him on a Sunday afternoon. Right after this Lofton, who also worked as personnel director of the City of Sumter and was an auxiliary policeman, arranged to have Peeples arrested by a Columbia motorcycle police officer with the use of a telephone

call and a phony message on the S.C. State police computer. That this was right before the trial on the trumped up grand larceny charge and was an attempt to coerce Peeples into agreeing with their terms, ie. sign a release on Lofton; promise not to sue Sumter County for breech of contract; and move out of Charleston promising not to compete with the monopoly that serviced general aviation on the Charleston Municipal Airport, AFB. That after several hours in jail Peeples attorney was able to secure his release from this unlawful arrest.

d. That in order to coerce Peeples from perticipation in the Civil Air Patrol by promoting general aviation and working privately on the Charleston Municipal Airport and promoting competition against the monopoly, Col. William B. Cheney, Jr., Commander of the Charleston CAP Squadron, beat

Peeples with a pole in the CAP compound.

That after about 8 to 10 years in the Civil Air Patrol, Peeples who held the rank of Cpt. had his membership terminated for no definite cause and by a procedure that was entirely void of due process in any manner.

f. that Peeples was finally attacked and shot with a military type .45 cal. automatic pistol while checking on his aircraft which was parked next to the CAP compound at the Charleston Municipal Airport by Col. Cheney, Commander of the Charleston CAP Sqdn.

g. That Peeples believes that the Civil Air Patrol has condoned activities that are depraved and of moral turpitude and more commonly associated with the Klu Klux Klan and more recently the Rev. Jim Jones Peoples Temple, etc., Gestapo.

h. That Peeples was sued by the City of

Charleston and the Civil Air Patrol as Official Auxiliary of the United States Air Force for trespassing and adverse possession of the air operations area at the Charleston Municipal Airport / AFB. The judge required him to move his aircraft from the airport. When Peeples finally located an area in an industrial park at the end of the runway where he could relocated his aircraft and his maintenance business the powers to-be had changed their minds about his moving and even though he had a court order to move Peeples was chased for over a mile down the runway with his twin engine aircraft behind a pickup truck over the fence and off of the airport by armed military police. Peeples again found himself in court on trespassing charges, this time with the United States Air Force without their auxiliary the Civil Air Patrol or the City of Charleston which had sold

its interest in the airport, he had hired a powerful attorney who screamed at him in front of the courtroom that he was not going to have anything to do with it, that he was going to quit on a related charge and would see Peeples committed for 10 years. Even though the trial was held Peeples was not allowed to show the jury his court order compelling him to move and because of this he pleaded nolo contendere on the advice of his extremely upset attorney. 6. That Peeples was not distributing any literature while he mingled with the crowd at Shaw AFB on November 2, 1980.

7. That in no way was Peeples inciting a riot or any form of violent disturbance at Shaw AFB on November 2, 1980.

8. That no criminal charges were ever brought against Peeples nor were any civil brought against Peeples over his actions at

Shaw AFB on November 2, 1980.

9. That Peeples never faced trial, formal charges for damage to anyones person or property or trespass nor was he ever convicted for any imagined offense for his activities on Shaw AFB on November 2, 1980.

10. That Peeples was attacked by certain law enforcement officials of the United States Government who were acting on orders from their superior officers and were not acting in any individual capacity, and, their only motive was to illegally deprive Peeples of the rights of freedom of expression and to petition the government for a redress of grievances at Shaw AFB By:

a. Unlawfully arresting him;

b. Assaulting him by grabbing him and handcuffing him;

c. Unlawfully removing his sign from around

his neck;

d. Unlawfully taking his books and papers;

e. Falsely imprisioning him.

12. That the Actions of the employees of the U.S. Government against Peeples on November 2, 1980 at Shaw AFB were:

a. Arbitrary;

b. Irrational;

c. Coercive;

d. Capricious;

e. Not reasonably related to a legitimate purpose;

f. Illegal.

13. That Peeples was singled out from thousands in a crowd only because of the fact that he voiced and displayed a view that was unpopular with the government and certain employees of the government unlawfully deprived him of his Constitutional rights at Shaw AFB on November 2, 1980 all because

of the whim and fancy of certain officers in the U.S. Air Force.

14. That Peeples was damaged during his altercation with certain law enforcement employees of the U.S. Government, on November 2, 1980 at Shaw AFB S.C., who were acting unlawfully. Peeples was damaged in his person and property by:

a. being assaulted;

b. being battered:

c. being falsely arrested;

d. being falsely imprisioned;

e. having his sign books and papers unlawfully taken from him;

f. having federal law enforcement officers unlawfully deprive him of his constitutional rights;

g. being harassed;

h. being intimidated;

i. being coerced;

j. being caused to fear serious bodily

harm;

k. having suffered bruises on both upper arms;

l. having suffered abrasions on both wrist;

m. having suffered grievous humiliation;

n. having suffered indignity;

o. having suffered nervous shock;

p. having suffered trauma.

15. That no other visitor at the Shaw AFB open house activity on November 2, 1980 had political campaign buttons, placards, hats or shirts and jackets with insignias on them, or bumper stickers taken from them or removed from their cars, and, Peeples was singled out for the single purpose that he voiced and displayed an unpopular view.

16. That the U.S. Air Force regulations prohibit actions which tend to be capricious

by its commanders and others acting in their official capacity.

17. That on November 2, 1980 Peeples was given a permanent bar letter signed by Col. Church Watkins Jr., Commander of Shaw AFB and that this bar letter was arbitrary, did not conform to standard procedures and was capricious to the point of being illegal and deprived Peeples of any reasonable due process.

18. That U.S. Air Force procedure for legal and non Capricious bar letters is in a form of an interim order not to reenter an installation for a period of two weeks while the commander is given ample opportunity to review any facts and response after which the commander can issue a final order not to reenter an installation for a period of up to two years which is the normal length of time that he could expect to remain in his position without being

transferred and enforce his order.

19. that the plaintiff, Peeples is entitled to $1,500,000.00 damages.

20. That Peeples is entitled to an injunction prohibiting such illegal activities as alleged in his complaint.

21. That Peeples is entitled to additional exemplary damages as a deterrent to further capricious and unconstitutional acts.

II. That each of the documents exhibited is genuine:

22. Check of Nov. 14, 1973 from Peeples to CAP.

23. Affidavit of Charles W. Lucas dated Oct. 9. 1975.

24. Statement of O.V. Player,Clerk of Court - March 21, 1977.

25. Record of arrest, Police Dpt. Columbia, S.C., #398278 dated Sunday October 26, 1975; final deposition Bench Warrant not valid.

26. Letter of Jan. 9, 1977 from Peeples to col. Morse, CAP.

27. letter of Sept. 14, 1977 from Col. Walter J. Reley, Jr., USAF Chief of Staff to Peeples.

28. City of Charleston incident report - Assault with Intent to Kill - Civil Air Patrol Area, Chas. Mun. Airport, dated Sept. 21, 1978 by Pfc. Lillian Jetter.

29. Letter of Feb. 29, 1980 form Peeples to Mr. Thomas A. Handley, National Hqts. C.A.P., Maxwell AFB, Ala.

30. Interim order not to reenter Charleston AFB dated Sept. 21, 1980 by Denneth E. Messick, Maj., USAF, Chief, Security Police to Peeples.

Respectfully submitted, John R. Peeples, Jr.

ENDORSEMENT

I CERTIFY THAT this request is made in good faith; the subject hereof is genuinely

relevant to this case; and evidence of the subject hereof is necessary to the establishment of my cause of action. John R. Peeples, Jr., Sworn to before me this day of , 1983 - Notary Public for South Carolina.

## Appendix - C

## DEFENDANT'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S REQUEST FOR ADMISSIONS RULE 36 F.R.C.P.

The defendant answers and objects to plaintiff's Request for Admission of Facts and Genuineness of Documents served on February 10, 1982 as follows:

1.

1. Admitted. 2. Denied -- But in this connection defendant states that at about 1:30 p.m. on November 2, 1980 at Shaw Air Force Base, Major Mayer, Lt. Serer, Sgt. Botchie, Sgt. Brown and Sgt. Lackey were acting as law enforcement officers within the scope of their government employment and that the facts are as set forth in the last paragraph on page 2 and the first two paragraphs on page 3 of the proposed Order submitted in connection with the Government's

summary judgment motion.

3. Admitted, Except as to the word "unconditionally" which is denied.

4. Admitted, except as to the statements regarding inscriptions and insignias as to which defendant has no information and as of this date is in no position to obtain and therefore defendant cannot truthfully admit or deny such statements.

5. as to the first unlettered paragraph, admitted, except as to the words "who were interested in his experiences with the Civil Air Patrol" which are denied.

6. a. Object -- for reason as follows:

Matter sought to be admitted is not within the scope of Rule 26(b), F.R.C.P., which is required by Rule 36, F.R.C.P., since Rule 26(b) limits discovery to any matter, not privileged, "which is relevant to the subject matter involved in the pending action"; and such matter sought to be

admitted is not so relevant. Vander Missen v. Kellogg-Citizens National Bank, 481 F.Supp. 742, 746-748 (D.C. Wis.-1979); Equal Employment Opportunity Commission v. Otto, 75 F.R.D. 824, (D.C.Md.-197); Rackley v. Board of Trustees of the Orangeburg Regional Hospital, 35 F.R.D. 516, 518 (D.C.S.C. - 1964); Burns v. Phillips, 50 F.R.D. 187, 188 (D.C.Ga. - 1970); and Al-Jundi v. Rockefeller, 91 F.R.D. 590, 592 (D.C.N.Y.-1981).

b. Objection -- for reason stated in paragraph a above.

c. Objection -- for reason stated in paragraph a above.

d. Objection -- for reason stated in paragraph a above.

e. Objection -- for reason stated in paragraph a above.

f. Objection -- for reason stated in paragraph a above.

g. Objection -- for reason stated in paragraph a above.

h. Objection -- for reason stated in paragraph a above.

6. Denied

7. Denied.

8. Admitted.

9. Admitted.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Admitted, except as to the last two lines which are denied.

16. Admitted.

17. Denied, except that defendant admits that on November 2, 1980 Peeples was given the attached letter dated November 2, 1980 and signed by Col. Church Watkins, Jr.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

II.

22. Object -- for reason stated in paragraph 5a. above.

23. Object -- for reason stated in paragraph 5a. above.

24. Object -- for reason stated in paragraph 5a. above.

25. Object -- for reason stated in paragraph 5a. above.

26. Object -- for reason stated in paragraph 5a. above.

27. Object -- for reason stated in paragraph 5a. above.

28. Object -- for reason stated in paragraph 5a. above.

29. Object -- for reason stated in paragraph 5a. above.

30. Object -- for reason stated in paragraph

5a. above.

HENRY DARGAN McMASTER, United States Attorney - By GLEN E. CRAIG, Assistant United States Attorney, Attorneys for the Government

attch.

DEPARTMENT OF THE AIR FORCE, HEADQUARTERS 363D COMBAT SUPPORT GROUP(TAC), SHAW AIR FORCE BASE, SOUTH CAROLINA 29152

Order not to Reenter Shaw Air Force Base - Mr. John R., Peeples Jr., P.O. Box 422 Sumter, S.C. 29150 - 1. On 2 Nov 80, you were observed demonstrating without proper authorization. You failed to cease and desist as ordered by proper authority. This authority stems from section 21 of the Internal Security Act which states, "Any directive promulgated by the commander of a Military Installation or facility is legally enforceable against all persons, whether or not those persons are subject

to the UCMJ." 2. You are hereby notified that, effective upon receipt of this letter, you are ordered not to reenter, or to be found within the limits of Shaw Air Force Base, South Carolina, including military housing projects and other outlying sites assigned to the aforementioned installation. Reentry will not be tolerated at any time, for any purpose. 3. Should any compelling reasons exist which you believe would warrant a modification or termination of this order, you should submit a request stating such reasons to this headquarters, Attention: Chief, Security Police, for my consideration. 4. Title 18 of the United States Code, Section 1382, sets forth the penalty for violation of this order and states: "Whoever within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station,

or installation, for any purpose prohibited by law or lawful regulation: or "Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed there from or ordered not to reenter by any officer or person in command or charge thereof----- Shall be fined not more than $500 or imprisioned not more than six months, or both."

CHURCH WATKINS, JR., Colonel, USAF, Commander

Mr. Peeples drives a White Ford Fiesta Lic#MWN-123 S.C.

Readiness is our Profession

Appendix - D

REPORT OF MAGISTRATE

This tort suit against the United States is before the court on the defendant's motion for summary judgment, supported by a proposed order in lieu of a brief, and based on the depositions of three persons who were involved in the incident which gave rise to this case, including the plaintiff, and on affidavits of other witnesses or participants. At the pretrial conference, the defendant's counsel announced his plan to move for summary judgment, whereupon the pro se plaintiff received an explanation of the right to oppose summary judgment, the proper procedure to follow, and the consequences to be expected if a properly supported Rule 56 motion is not adequately opposed. The plaintiff has filed an "affidavit" to oppose the defendant's motion, but it is an affidavit

in form only, containing no Rule 56(e) substance.

1 The plaintiff, after the period for completing discovery ended, attached to his "affidavit" a request for admissions of fact and the genuineness of documents. His factual statements are argumentative and conclusory for the most part, and much of the lengthly request relates to matters not involved in this case under the pleadings.

The record reveals that the plaintiff was formerly a member of the Civil Air Patrol (CAP) until he was expelled from that organization. For some reason not clearly revealed, an acrimonious relationship developed between the plaintiff and his former superiors in the CAP organization. When the plaintiff learned on the first day of a two-day Open House at Shaw Air Force Base that the CAP had an exhibit at the

Open House, scheduled for November 1-2, 1980, he decided to stage a one-man demonstration against the CAP during the second day of the Open House program.

2 Shaw AFB has held these Open House festivities annually (or less frequently) for many year. The general public is invited to attend and to view static displays of aircraft and other defense weaponry and components. Visitors are led to parking areas and pedestrian areas open to the public. Demonstration flight teams such as the internationally renowned Thunderbirds and Blue Angels often participate in the activities, which usually draw thousands of spectators. The record suggests that the crowd present on November 2, 1980 exceeded 50,000 persons, the vast majority of whom were civilians. CAP "cadets" serve as ushers and perform many other voluntary services at all such functions

in view of the role of the CAP as an "auxiliary" of the Air Force.

In his deposition, the plaintiff testified that he visited Shaw on the first day of the Open House and inquired of an unidentified colonel about arrangements for someone who wanted to express a "different" point of view about the CAP. He does not contend he was given any permit to do any form of picketing or demonstrating. he only states that he was told that Shaw personnel did not get involved in such matters.

It is undisputed that the plaintiff went on the ramp area at Shaw near the grandstands during the second day of the Open House while carrying a sign around his neck, described by him as about the size of a T-shirt, containing the following legend: Civil Air Patrol - Auxiliary of the United States Air Force - Liars? Murders?

Thieves? Thugs? Slime? Scum? Congress Should Investigate! The plaintiff states that he also had with him a publication by the Congress of the United States which describes the constitutional rights of private citizens.

3 The plaintiff is a so-called tax protestor. He has another case pending here, Peeples v. United States, Civil Action No. 84-391-O, in which he is seeking to avoid payment of a civil penalty assessed under the Tax Equity and Fiscal Responsibility Act of 1982 as a result of the manner in which he completed his 1982 federal income tax return (Form 1040). He refused in his return on alleged Fifth Amendment grounds to give any information that is material, including his occupation (which he testified about in this tort action). To oppose a pending motion for summary judgment in the civil penalty suit, the

plaintiff has submitted a congressional pamphlet, entitled "Citizen's Guide to Individual Rights Under the Constitution of the United States of America," distributed by a subcommittee of the Committee on the Judiciary of the United States Senate (October 1976 edition). Whether that publication is the one the plaintiff had with him at Shaw is not established.

He denies that he was distributing any leaflets, but he alleges he was telling people how he had been mistreated by CAP personnel. It is also undisputed that Shaw AFB security personnel approached the plaintiff and asked him to put away his sign, and that he refused to do so, at which point he was taken into custody by two noncommissioned officers, on the orders of a major in command of the security detail, and transported by vehicle to the Base Security Office. At that office, he was

given a disbarment letter. Thereafter, he was escorted off the base, and his property was returned to him.

The plaintiff claims that Shaw officials violated his First Amendment right to express his opinion of the CAP and petition for the redress of his grievances against it, and that his Forth Amendment rights were violated by a false arrest, and false imprisionment. He also contends that he was victimized by an assault and battery when excessive force was used by the two NCO's who placed handcuffs on him before he was placed in the vehicle (truck) which transported him from the ramp area where he was accosted to the office where he received the bar letter. The defendant denies that any of the plaintiff's constitutional rights were violated, and denies that excessive force was used against him. The defendant also contends

that the Shaw personnel acted in good faith to carry out their duties and responsibilities, and alleges that such good faith inures to the benefit of the United States in this case.

4 For this defense the defendant relies upon Norton v. United States, 581 F.2d 390 (4th Cir. 1978), which held that the liability of the government under 28 U.S.C. Sec 2680(h) for an arrest or an assault is coterminous with the liability of its agents-actors in any action based on the rule of Bivens v. Narcotics Agents, 403 U.S. 388 (1971).

In support of its motion, the defendant has filed affidavits of Colonel Church Watkins, Jr., Major Theodore H. Mayer, Master Sergeant Thomas G. Botchie, and Mr. Joseph F. Seigler, whose rank (if any) is not shown. In addition, depositions of the plaintiff, Botchie, and Master

Sergeant William E. Lackey are also on file. Two exhibits are attached to Mayer's affidavit, one containing a base map showing the flightline where displays were located during the Open House, and the location of the Base Security Office, and one exhibit describing the postings of signs cautioning that visitors were subject to being searched on the base as a condition of permissible entry thereto. There are six exhibits with the plaintiff's deposition. There are (1) a copy of the notice of the deposition; (2) a copy of the plaintiff's administrative claim made to the Air Force, dated November 3, 1980; (3) a letter from the plaintiff to Colonel Watkins on November 8, 1980; (4) a response to that letter form Major Michael W. Cude on December 1, 1980; (5) six photographs which the plaintiff states illustrate injuries to both his arms and his right

wrist, allegedly taken by him on November 8, 1980; and (6) a newspaper clipping of October 31, 1980, which described the two-day Open House schedule to start on the next day. With the letter of Major Cude, there is a copy of what the plaintiff conceded to be the report of the only medical examination of his alleged injuries suffered on November 2, 1980, in which report a doctor at Shaw AFB consulted by the plaintiff on November 14, 1980, twelve days after the incident occurred, reported:

"This patient claims to have been assaulted by security police during a protest against the Civil Air Patrol at Shaw AFB, S.C. The incident took place on November 2, 1980. He states that he was thrown against a truck and handcuffed very tightly. He states that he received bruises on both upper arms and abrasions on

both wrists secondary to the previously described trauma. He has seen no other doctors prior to this examination and is presently on no other medication "*** "Physical Examination "*** "Extremities- Patient has a 3 cm bruise of his (R) upper arm. There is no evidence of bruising or trauma of the (L) arm. There is also a well-healed 1 cm abrasion of his (R) wrist. Note 2 small (old) puncture wounds on (R) forearm. "*** "Imp-this depressed white male gives a fairly complicated description of alleged abuse by the security police on 2 Nov 80. He denies any previous history of psychiatric illness or significant past medical history. On physical exam he shows very minimal trauma. He does have small ecchymotic area on his (R) wrist. It is important to note that the alleged trauma occurred [sic] 12 days prior to this examination. Taking the above

findings into consideration, I seriously doubt that Mr. Peeples sustained any significant injuries during his altercation at Shaw AFB." (signed) "James Dean Givens, M.D." [Capt. USAF, M C, FS] [USAF RGN HOSP. SHAW]

the numbers of Air Force personnel involved, the amount of force employed by them in removing the plaintiff from the ramp area, and the legal conclusions to be derived from the facts, are matters in issue.

Since the defendant has the burden under Rule 56 to show the nonexistence of a genuine issue of material fact, its affidavits and depositions of USAF personnel will be briefly digested first.

Master Sergeant Botchie avers in his affidavit that the plaintiff was observed waling on the flight line during the open house, carrying a cardboard sign around his

neck containing "wording degrading to the Civil Air Patrol."

5 The affidavit states the incident occurred on November 1, 1980, but this is apparently a scrivener's error. All parties seem to agree the incident occurred on the 2nd of November, which was a Sunday.

According to Botchie, Major Mayer, accompanied by him, Lackey, and a Master Sergeant Brown, approached the plaintiff,k who was carrying papers in his hand. Mayer advised the plaintiff he was welcome to attend the Open House, but he could not continue to display the sign fastened around his neck. According to Botchie, the plaintiff became "boisterous" and began reading loudly form a pamphlet he was carrying. After the plaintiff refused to remove the sign and become quieter, Major Mayer instructed the detail to remove the plaintiff

from the area and from the base. Lackey thereupon advised the plaintiff he would be detained for removal form the base. The plaintiff, according to Botchie, became even more boisterous, and Master Sergeant Brown placed handcuffs on him, and the plaintiff was taken away from the flight line in a security police motor vehicle. Botchie avers that no unnecessary force was used.

Maj. Mayer's affidavit corroborates Botchie's affidavit, and adds further details. Mayer avers that the Deputy Base Commander, Col Schaaf, First Lieutenant Eduardo Serer, and a Mr. Seigler of OSI also witnessed the incident when the plaintiff was approached by his detail and later removed from the ramp area. The major states that when he first spoke to the plaintiff, he advised the plaintiff that he could not display his sign and distribute

literature during the Open House, because such activities violated base policy, section 21 of the Internal Security Act of 1950, and Title 18, United States Code, Section 1382, unless prior approval for such activities had been obtained. The major adds that the plaintiff had no apparent injuries as a result of the incident. He informed the plaintiff a bar letter would be issued, and the major personally took the bar letter to the Base Commander, who signed it. After the bar letter was served on the plaintiff, he was escorted off the base, where his property was returned to him and he was told not to reenter Shaw. The major expresses his opinion that the plaintiff appeared to him to want to be apprehended for some reason.

Colonel Watkins avers that he signed the bar letter after advising the plaintiff he could remain at the open house if he

did not demonstrate, and receiving the plaintiff's response that he had a right to demonstrate. Watkins adds that he saw no visible signs of injury to the plaintiff, although the latter was displaying an area on his arm where he had been shot on some prior occasion. Watkens denies the plaintiff's allegations that he yelled and screamed at the plaintiff.

Joseph F. Seigler avers that he witnessed the apprehension of the plaintiff on the ramp area of the base. He states he noticed a "commotion" near the VIP viewing stands, and walked toward that scene where he saw Schaaf, Mayer, Lackey, and another person confronting a civilian who was carrying a derogatory sign about the CAP. Seigler overheard Mayer advising the plaintiff of his options, and the affiant states the plaintiff refused to cooperate, whereupon Mayer instructed Lackey to apprehend

him. Lackey, according to Seigler, "effected the apprehension in the prescribed manner, pining [sic] the individuals [sic] arm(s) behind the back and putting on the handcuffs, then searching the body for weapons.: Seigler avers that the plaintiff did not resist, and that he (Seigler) does not feel the plaintiff was roughly handled. Seigler has the impression security police handled the incident efficiently and fairly, and with a minimum of public awareness that any disagreement between base security officers and the plaintiff even occurred.

In his deposition, Master Sergeant Botchie testified about his lengthly experience as a law enforcement officer (both civilian and military) assigned to "crowd control" situations which involved public demonstrations in Washington, D.C. and in overseas locations. Botchie testified

that he had seen all forms of demonstrations in his experience, and he expressed a firm opinion that no excessive force at all was employed against the plaintiff at Shaw on November 2, 1980. Botchie said it appeared obvious to him that the plaintiff was trying to attract attention to himself by loud remarks during the Open House, and that Major Mayer ordered the plaintiff's removal form the ramp area only to put down a highly disruptive situation. Botchie said the plaintiff told the military personnel that he as a civilian could not be made to accompany them, and that the handcuffing and the pat-down of the vociferous civilian were necessary as good police procedure. He said that Lackey did not use unnecessary force at any time.

In his deposition, Master Sergeant Lackey said that Major Mayer asked him and others to remove the plaintiff to the Base Security

Office from the flight line only after the plaintiff repeatedly refused the major's offer for him to remain in the area provided he ceased his little one-man demonstration. Lackey also testified that no unnecessary force was used against the plaintiff.

The plaintiff in his deposition manifested the same "scatter-shot" allegations that he has set out in his pleadings. At no point has he ever said that he had expressed premission to demonstrate against the CAP during the Open House at Shaw. He contends that since November 2, 1980 occurred only two days before the 1980 general election, with the result that a myriad of political hats, pins and buttons, and automobile bumper stickers were in evidence, his little demonstration against the CAP was no more offensive to base security and regulations governing visitors'

conduct than the patent displays by others of their political allegiences. He believes he was singled out for capricious mistreatment only because he was critical of the CAP, and he argues that his speech content and his right to express his criticism were both shielded by First Amendment form such reprisals as base officials visited upon him.

The Plaintiff said he is a 33 year-old high school graduate who has resided in Sumter all his life, except for four years in the Air Force in 1968-1972. He was discharged as a Staff Sergeant at the Charleston Air Force Base. His testimony concerning his employment since his discharge was hazy, and he claimed he had consumed about four years handling an earlier federal case he filed here against the mayor of Charleston and others.

6 That earlier case was Peeples v. Riley,

et al., Civil Action No. 77-1024-1, which was a 42 U.S.C. Sec. 1983 civil rights case for alleged violations of the plaintiff's right (as a pilot) to use the Charleston Municipal Airport. [The instant case file reveals that the plaintiff was barred on an interim bases in 1980 form going on the Charleston Air Force Base located at that same facility.] Judge Hawkins granted summary judgment for the defendants on October 16, 1979, and his disposition of the case was later affirmed by the United States Court of Appeals for the Forth Circuit in No. 79-1709. In his deposition here (page 11), the plaintiff remarked, "Hawkins told me that I didn't have any rights because I wasn't black, female, or Jewish, and for me to go home."

He testified that during his demonstration at Shaw he read from some of his briefs prepared for use in that case, but he

never explained the relevance of that case to his case against the government over the Shaw incident.

The plaintiff testified that he went to Shaw on November 2, 1980 because he wanted to refute the "nice-guys" impression CAP personnel were attempting to create for themselves (Dep. 13-14). He said, "I just wanted to tell everybody about the experience that I had with them." (Dep. 14, ff. 8-9). He said his placard "was a petition for Congress to investigate the Civil Air Patrol." He said he started walking around among the visitors to the Open House, and that whenever he would "see somebody," he would "stop them and show them the holes where the colonel in the Civil Air Patrol had shot me with a .45, and if they wanted to listen, I'd tell them more." (Dep. 16-17). He justified his conduct by stating, "*** [T]hey

had the Civil Air Patrol out there telling what their point of view was, and I just wanted everybody to know a different point of vow." (Dep. 17, ff. 16-19). He implied he asked for authorization to conduct his one-man demonstration, but his testimony fell short of the intended mark. (Dep. 18, ff. 5-18). Although the plaintiff said he demonstrated about fifteen to twenty minutes, he testified he did not remember whether any Air Force personnel contacted him to ask him to cease his little demonstration. (Dep. 20-22). His memory, however, was much clearer when he sought to describe the alleged use of excessive force by Shaw security personnel. (Dep. 21 ff. 23-25; Dep. 22-23). He said that when he was taken to the "police station" at Shaw, a Colonel Watkins started "interrogating" him, "yelling" at him, and "kept screaming." The plaintiff said that he remained

silent (as he had been told he had a right to do). The plaintiff acknowledged he was told not to reenter Shaw, and he also weakly acknowledged that his sign and papers were returned to him after he was escorted off the base.

the plaintiff admitted he sought no medical assistance after the incident, until he went to an Air Force doctor much later. He rationalizes that he should not have to incur a medical bill since "they" (the Air Force) "beat me up." (Dep. 26).

The plaintiff reiterated that he recalls nothing said to him by security personnel before he was removed form the ramp area. He said "all the police" is enough for one person to remember." (Dep. 29).

Asked by the government's attorney (A.U.S.A. Craig) to amplify his complaint averments as to deprivations of constitutional rights claimed, the plaintiff said "the

only ones" were the "right of freedom of speech and expression, and the right to petition the government for a redress of grievances." (Dep.29). He then explained what he meant by his claims that he was "assaulted" and "battered." he narrowed his list of assailants to "a big, black sergeant," whom he characterized as "a little gorilla," and described the battery as bruises and abrasions," the bruises "all over me, " and the scraping of skin off his wrists by the handcuffs "they" applied on him "real tight. " (Dep. 30, ff. 4-5; 9-10; 12; 22-24). The plaintiff said he had alleged a false arrest because he was apprehended for expressing his opinion about the CAP, without just cause for an arrest, and that he had alleged a false imprisionment because of his detention, first in the vehicle and later for from thirty minutes to ninety minutes in the Base

Security Office, later changed by him to "probably an hour." (Dep. 30-31).

The plaintiff testified the CAP had an aircraft on static display, but he could not recall "if they had the cadets out there." (Dep. 30-31). He recalls the CAP may have had signs stating it was an Air Force "auxiliary." Asked if he believed this reference caused him to feel he had a right to have his placard about he CAP hanging on his chest, the plaintiff answered in the negative. He said (Dep. 34):

"No. No. It was a public gathering, like being out on the street. You know, the Air Force Base was open to the public. The Civil Air Patrol was out there giving their point of view and I thought the people ought to know a differing point of view."

Asked what point of view the CAP was giving,

the plaintiff vaguely responded, and then said he told persons he "had been in that outfit, at one time, and . . . had learned an awful lot." (Dep. 34).

7 The plaintiff earlier testified (Dep.21) that he had told listeners that he had been shot by CAP personnel, and that it was "tyranny" for an organization supported by the Air force "to be out shooting people.:"

He then endeavored to explain why he had been thrown out of the CAP, but his narrative was not very clear. (Dep. 35-36).

The plaintiff said he had alleged "capricious" action in his complaint because Shaw AFB personnel "flaunted their power around in an irrational manner." He added (Dep. 36), "they had the guns, and the police, and they grabbed me and bruised me up, and took me away, and took my

sign, and deprived me of my rights. It was capricious." He said he felt coerced because he was "threatened" by "the police" who "had guns."

8 The plaintiff has never alleged that any weapons were drawn.

Asked how he had been threatened, disregarding his metaphor ("like a dog"), the plaintiff made it clear that his fear was largely subjective. he said, "I was coerced, intimidated by their power." (Ibid.). He said he was harassed "in the same way" he was coerced and assaulted, and that he was intimidated because "they" had guns were larger than he, and outnumbered him. (Dep. 37).

Asked to describe his damages, the plaintiff said he was "bruised up," "had abrasions on [his] wrists, " and was "humiliated, indignified, [and] had nervous shock."

The plaintiff admitted he only saw the one Air Force doctor for a review of his condition, and said he knew of no other eyewitnesses whom he could identify, except for possibly a former employee of the Federal Aviation Agency ("Jim Starling," now retired), whose testimony as described by the plaintiff would be hearsay.

Asked to describe his grievance against the government again, the plaintiff testified (Dep. 41):

"* * * They got a law called the Constitution of the United States of America. These guys work for the Government. They took an oath to obey the constitution. They didn't do their job. They beat me up, took my sign, they deprived me of my rights that I have got under the law, and they've got to pay."

The plaintiff said he goes to a doctor

only once a year for a flight physical to retain his license as an aircraft pilot. he owns a junked airplane, and rents an aircraft when he occasionally flies. His testimony as to his licensed status as a pilot was far less than clear. (Dep. 42-44). His testimony about prior litigation in which he has been involved was no less unclear. (Dep. 45-50).

The plaintiff, after agreeing to submit exhibits the defendant's attorney asked him to submit (photographs and news clippings), then explained in his own words what he stated to people who would listen to him at the Shaw AFB Open House. His explanation was an account of his own personal disagreements with former CAP personnel. (Dep. 56-58).

9 As earlier pointed out herein in note 1, the plaintiff's attempt to oppose the defendant's motion for summary judgment

also shows his apparent preoccupation with his alleged grievances with former CAP personnel, and other problem she had encountered which have nothing to do with the Shaw AFB Open House, except to the extent that the plaintiff seized that event as forum to announce his dislike for the Civil Air Patrol.

In the proposed order submitted in lieu of a brief, the United States Attorney has fairly summarized the depositions and affidavits on file, upon which the government's motion for summary judgment is based. The authorities cited therein are persuasive, and on point. The government stresses the apparent good faith of its actors, the security personnel who abruptly interrupted the plaintiff's public protestations of what he believes to have been his mistreatment by CAP officials in the past after he refused to voluntarily

stop his little demonstration, and points to the overwhelming weight of the evidence of record that excessive force was not employed against the plaintiff, and that the plaintiff's claimed personal and emotional injuries are wholly unsupported by competent objective evidence. The defendant points out that the plaintiff's sign, most probably motivated by his seething anger directed to CAP personnel, contained language of such an intemperate nature as to approach being "fighting words," a proscription of which is not unconstitutional under certain circumstances according to Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1941). See also Federal Communication Commission v. Pacifica Foundation, 438 U.S. 726, 745 (1977).

The government then urges that, even if the plaintiff did have a First Amendment right to carry on his little protest demonstration

during the Open House activities at Shaw AFB, it was reasonable for the head of the security detail, Major Mayer, to believe that the plaintiff's conduct was prohibited at the Open House. It cites Hill v. Rowland, 474 f2d 1374, 1378 (4th Cir. 1973), which cited Bivens, supra, as teaching that the courts should exercise restraint in condemning government agents who act in good faith and with a reasonable belief in the validity of an arrest and search of a person believed to be engaged in unlawful conduct. The same judicial perspective is urged for application as to the reasonableness of the force used by officers making an arrest. In short, the government urges that the question here is not whether the actions of Major Mayer and his subordinates were unlawful, but whether, instead, the security detail acted in good faith, and with a reasonable belief

in the validity of their actions under the teachings of Norton, Hill, and Bivens. The defendant recognizes that summary judgment is not easily awarded when the state of mind of an alleged tort feasor may be in issue, but it urges that Rule 56 becomes fully applicable when a frivolous lawsuit is filed to harass officers, citing Maiorana v. MacDonald, 596 F.2d 1072 (1st Cir. 1979), and authorities therein discussed.

As earlier mentioned, the plaintiff has attempted to create issued of fact by appending an inappropriate discovery request to his "affidavit" in opposition to summary judgment. Unverified facts are asserted in the discovery request that have nothing to do with this case, and these matters illustrate the intensity of the plaintiff's subjective dislike of the CAP. The plaintiff's other factual statements which

do relate to the Open House incident more or less track his testimony by deposition. The nine exhibits attached to the request for admission are not material to this suit.

Discussion

The plaintiff's case is premised on two arguments and his proof of both arguments is so weak, if evidence exists at all as to either component, that his arguments are left suspended as abstract questions of law without adequate factual foundations. He urges first that he was arbitrarily and capriciously deprived of his constitutional rights because he was forcefully denied the freedom to protest against the CAP at the Shaw AFB Open House. The second prong of his argument is that he was victimized by an assault and battery, a false arrest, and false imprisonment, all perpetrated by agents of the United

States Government.

Two recent cases deal with groups or individuals who wished to participate in open house activities to present idealogical information. Both cases concern anti-war protestors who were denied participation. Persons For Free Speech at SAC v. United States Air Force, 675 F.2d 1010 (8th Cir. 1982), cert. denied, U.S. (1982), held that an open house is within the usual range of traditional military activities, and thus no public forum is created, including a temporary one. The court there concluded the Air Force did not violate the appellants' right to equal protection when it reasonably limited groups participating in the open house to groups whose activities were consistent with the purpose of the open house. Relying on Greer v. Spock, 424 U.S. 838 (1976), upholding the decision of a commanding

officer of Fort Dix to deny access to that base for political campaigning the court in Persons, in a split decision, noted that the guarantees of the First Amendment have never meant that people who want to propagandize protests or views have a constitutional right to do so whenever, however, and wherever they please.

In contrast, United States of America v. Albertini, 710 F.2d 1410 (9th Cir. 1983), rejected the analysis in Persons. The Ninth Circuit asserted that there exists substantial body of case law supporting the concept of a temporary public forum. the court noted that when the government creates a public forum by opening its property to the public for purposes related to expression, even though it is under no duty to do so, its power to exclude the expression is severely limited. Reasonable time, place, and manner regulations

are permissible, but a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. The court further stated that the Air Force, in utilizing the open house as a forum to disseminate its message that defense appropriations were being used wisely, had established a subject matter as an appropriate one for debate, and that Albertini's peaceful protest against the arms race was clearly within the designated subject matter. Albertini in that case had quietly handed out his leaflets, and he apparently was not disruptive.

The plaintiff's case here is readily distinguishable form Albertini in that Mr. Peeples did not attend the open house to protest the arms race, or any other "issue of considerable public interest today," to quote form Albertini, 710 F.2d at 1415. He attended to attack the CAP for his past difficulties

with people associated with it, and for not other reason. Although the defendant refers to the use of "fighting words" in its proposed order, and Mr. Peeples may have orally called CAP personnel liars, etc., there is no evidence that he did so. What is evident is that he walked around with a sign hanging from his neck, a sign which referred to the auxiliary personnel as thieves, scum, etc. Peeples does not appear to appreciate the difference between the right to express one's opinion, and the right of others to be free from defamatory remarks which adversely affect their reputations. A corporation, unincorporated association, or a partnership may be defamed by remarks as to its financial condition, honesty or integrity. Although there is no evidence that the reputation of the CAP was actually damaged by Peeples' sign, Peeples' behavior meets at

least four of the five elements required in establishing a prima facie case of defamation. He intentionally published to third persons clearly defamatory language about an identified group of persons, or the organization.

Whether the plaintiff's expressions are characterized as fighting words or as libel or slander, the right of free expression is certainly not limitless. Obscene material, libelous writings, and commercial speech are all examples of speech that is either unprotected or subject to reasonable regulation. Fighting words also represent a category of speech that does not enjoy unrestrained protection. United Steelworkers of America, et al. v. Dalton, et al., 544 F.Supp. 282, 286 (E.D.Va. 1982).

Assuming for this purpose that a temporary public forum was actually created at

Shaw by the general invitation to the public to attend the Open House, such as the court in Albertini found, unlike the plaintiff in Albertini, the time, place, manner and content of Mr. Peeples' protest was not compatible with the activities at Shaw. Peeples was not protesting the activities of the military; he was clearly defaming one of the permitted displayers, and for a purely selfish reason. Unlike the protester Albertini, he was not quietly handing out leaflets, which visitors at Shaw could choose to accept or refuse. He was displaying a sign in plane view of a relatively large number of people. Also, he testified that he stopped people to tell them about his difficulties with CAP. The appropriate place for his type of protest concerning his alleged mistreatment by members of the CAP would be the court system, not an Open House at Shaw AFB. The manner

and the content of his message were also not in keeping with the activities, as noted earlier.

Thus, it would appear that under either the temporary forum holding of Albertini, or under the traditional range holding of Persons, Peeples was not deprived of his First Amendment rights to freedom of speech or to petition the government for redress of grievances, and he is far wide of the mark when he equates his conduct at Shaw to the display by others of political buttons and signs.

Although it is possible to sue the government for the intentional torts of law enforcement officers under 28 U.S.C. 2680(h), when law enforcement officers are sued for intentional constitutional torts, they are entitled to assert the good faith and reasonable belief defense which may exonerate them and the government from liability.

Norton v. United States, supra. Here, there is evidence in the record that Peeples knew before he went to Shaw that a protest of the CAP on his part was not authorized activity. A substantial body of testimony and affidavits reveal clearly that Peeples was told successively that he was welcome to stay at Shaw if he abandoned his protest, and was warned he would be removed if he did not do so. Mr. Peeples deliberately chose to continue his protest, and he was apprehended and detained while the bar letter was prepared. He invited apprehension and ejectment from Shaw. The right of the security police to apprehend and eject Peeples could flow either from the right of the base commander, as in Persons, to determine who may come onto Shaw, or from Albertini, as an inappropriate forum for Peeples' harangue of CAP personnel.

The handcuffing and the pat down for weapons are standard operating procedures, used not only by military police, but also by civilian police departments. A substantial body of testimony indicates the plaintiff was neither assaulted nor battered. The physician's report in evidence indicated that the plaintiff had no significant injury. Lackey testified he used only necessary force, and his testimony is corroborated by Seigler's affidavit. Botchie testified that no unnecessary force was used. Watkins and Mayer noted no injuries. The fact that no formal charges were ever filed against the plaintiff is of no significance.

Mr. Peeples is his sole witness. His version of the incident is contradicted in all significant aspects by five people. His alleged injuries, which in the case of bruises were probably not apparent at the time

of the incident, are not substantiated by the only doctor he chose to see. It may appear to Mr. Peeples that the Air Force is "ganging up" on him, but he could have chosen a civilian doctor to examine him, and he also could have chosen a photographer to take the pictures of what he alleges were injuries.

Recommendation

the overwhelming weight of the evidence presented does not support the plaintiff's claim that he was deprived of constitutional rights, or that he was assaulted and battered intentionally by Shaw AFB Security Police. There is clearly no genuine issue of any material fact for trial in this case. Accordingly, I recommend that the court grant the defendant's motion for summary judgment.Respectfully submitted, Charles W. Gambrell, United States Magistrate, November 8, 1984 * * *

(See

Notice on following page)

NOTICE

the plaintiff has a right to file objections to the foregoing report, which recommends entry of a summary judgment for the defendant, for review by the court before it considers the matter. Objections, if any, must be filed on or before November 21, 1984 with the Clerk of Court, whose mail address is P.O. Box 867, Columbia, South Carolina 29202. If the plaintiff files objections, he should serve a copy thereof by mail on the defendant's counsel.

Appendix - E

ORDER

This matter is before the Court pursuant to the Report of United States Magistrate Charles W. Gambrell to whom it was referred under 28 U.S.C. Sec. 636 and the standing Orders of this Court for a determination of the relevant facts and a recommendation concerning its disposition. After thoroughly reviewing the evidence of record, including the depositions and affidavits submitted by the parties, together with the applicable law, the Magistrate concludes that the overwhelming weight of the evidence presented does not support the plaintiff's claim that he was deprived of constitutional rights or that he was unlawfully assaulted and battered by the Shaw Air Force Base Security Police. Upon the further finding that there is no genuine

issue of any material fact, he recommends that the defendant's motion for summary judgment be granted. No exception has been filed.

Upon review of the pleadings, the evidence of record and the Report of Magistrate which is hereby adopted, the Court hereby approves the recommendation. Summary judgment for the defendant is hereby granted.

IT IS SO ORDERED. March 15, 1985, MATTHEW J. PERRY, UNITED STATES DISTRICT JUDGE